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No. 1364

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IN THE

Supreme Court of the United States

October Term, 1966

LOUIS O'D. LEE,

Petitioner,

v.

ST. JOE PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 371 F.2d 797 (2d Cir. 1967), and printed in Petitioner's Appendix, pp. 2a-6a.

The opinion of Hon. Edward C. McLean, U.S.D.J., granting in part Petitioner's post-trial motion to add pre-judgment interest is unreported (428a-434a*). It is printed as Appendix A herein.

* References preceded by "R" are to the Record, references followed by suffix "a" or "b" are to the printed appendices of Respondent and Petitioner, respectively, in the Court below.

The opinion of Hon. Edmund L. Palmieri, U.S. D.J., denying Respondent's motion for summary judgment, is unreported (R. 1916-21). It is printed as Appendix B herein.

The opinion of Hon. Charles M. Metzner, U.S.D.J., granting Petitioner's motion to strike the affirmative defense of the Statute of Frauds is reported at 197 F. Supp. 229 (S.D.N.Y. 1961). It is printed as Appendix C herein.

The opinion of Hon. Frederick Van P. Bryan, U.S.D.J., denying Respondent's motion for change of venue pursuant to 28 U.S.C. §1404(a), is unreported (R. 1230-33). It is printed as Appendix D herein.

Jurisdiction

The decision of the Court of Appeals was entered January 25, 1967, and a petition for rehearing was denied on March 3, 1967. The petition for the writ of certiorari was filed May 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Petitioner, during approximately six years of litigation, repeatedly contended successfully that the substantive law of New York governed his claim in *quantum meruit* for a broker's or finder's fee, and that such a claim was not barred by the New York Statute of Frauds, enacted in 1949. In 1966, New York's highest

court, in a case the final outcome of which Respondent has consistently maintained would be determinative of this action, for the first time interpreted the provision of the New York Statute of Frauds governing business opportunity brokers (N.Y. Personal Property Law §31(10)), and held that the statute did bar a claim such as Petitioner's (*Minichiello* v. *Royal Business Funds Corp.*, petition for certiorari now pending, No. 1363, Oct. Term 1966). The question presented is

> Did the Court of Appeals abuse its discretion by denying rehearing on Petitioner's claims, asserted for the first time in his motion for rehearing, that
>
> (a) the law of New York should now be held not to apply in this case, or that
>
> (b) Petitioner should be permitted to amend his complaint in order to assert a new claim not governed by the New York Statute of Frauds?

Reasons for Denying the Petition

Petitioner has advanced three grounds in support of his petition, none of which meets the standards enunciated in Rule 19 or elsewhere to justify the grant of certiorari.

I.

This suit was commenced by Petitioner in December 1960 in the New York State courts, and removed to the Southern District of New York on the ground of diversity of citizenship (R. 1164-74). On Respond-

ent's motion to transfer the action under 28 U.S.C. §1404(a), Petitioner successfully resisted the motion on the ground that the facts pleaded by Petitioner showed conclusively that the internal law of New York would govern his rights (see Appendix D to this Brief). In his affidavit in opposition to the motion, Petitioner recited all of the work which he claimed was performed by him in New York, and then stated (at p. 5):

> "My counsel advises me that, contrary to the claim in Mr. Ball's affidavit (p. 5), the law of New York and not the law of Florida will govern my rights against the defendant."

After Respondent, in its answer, had pleaded the affirmative defense of the Statute of Frauds, Petitioner had that defense struck by the District Court (197 F. Supp. 229 (S.D.N.Y. 1961); Appendix C to this Brief).

Prior to trial, the choice-of-law question was again raised in Respondent's motion for summary judgment (R. 1916-21; Appendix B to this Brief), and thereafter the parties proceeded to trial on the basis that New York law governed Petitioner's claim.

After verdict, the choice of law again became material in Petitioner's motion to add pre-judgment interest to the verdict. In his memorandum in support of that motion, Petitioner stated (p. 3):

> "[I]t may be said that substantially all, if not all, of Mr. Lee's functions as a finder were per-

> formed in New York. Since the contract was not only made in New York but was also substantially performed in New York, the New York law should be held to govern plaintiff's right to pre-judgment interest on the verdict."

The Court, in its opinion granting Petitioner's motion in part, held squarely that New York law governed this transaction (428a-434a; Appendix A to this Brief). In the Court of Appeals, Petitioner rested his case on Judge McLean's opinion on the choice-of-law question (Plaintiff's Br., 20-21).

The repeated motions concerning the applicability of the New York Statute of Frauds to Petitioner's claim throughout the lengthy course of this litigation, and Petitioner's consistent reliance on New York law, have been totally ignored in the petition, and it is now stated that "the New York contacts were insignificant" (Petition, p. 11).

Petitioner apparently argues that, having tried his case and lost, he should now be given an opportunity to change his mind as to the relevant facts and applicable law in order to have another opportunity to press his claim, a claim which he should have known was barred at the commencement of this action.

II

Petitioner's second ground in support of this petition is that the Court of Appeals should have considered the constitutionality of the decision by the New York Court of Appeals which was followed in reversing the judgment for Petitioner. The constitutional

question itself is not pressed on this petition and Petitioner concedes that this ground falls if the petition is denied in the *Minichiello* case (No. 1363, Oct. Term 1966). On this point, Petitioner has stated no independent reason for granting the petition.

III

Petitioner's last point, which personifies the ultimate expression of his sporting theory of justice, is that he should now be given an opportunity to amend his complaint in order to assert an undefined claim for work, labor and services performed. In fact, the entire petition is based upon the fallacious assumption that there has been a change in the law of New York, an assertion which is completely refuted in the *Minichiello* case, and therefore Petitioner should be allowed to change the relevant facts of his case.

Admittedly, Petitioner in 1957 was offered a sum of money by Respondent if Petitioner helped in concluding the negotiations, which Petitioner flatly rejected (26a; 293a-94a). Instead, Petitioner commenced this action in *quantum meruit* to recover a broker's fee of $175,000, and throughout this litigation was well aware of Respondent's contention that his claim was barred by the Statute of Frauds.* After more than

* Petitioner notes (Petition, p. 6) that Respondent attempted to defer the argument of this case in the Court of Appeals until after a decision was rendered in the *Minichiello* case, thus rendering hollow Petitioner's claimed suprise with that decision. In addition, it should be noted that the same counsel argued for Petitioner in the Court of Appeals in this case, and for the plaintiff in the New York Court of Appeals in the *Minichiello* case. (*Compare,* 371 F.2d 797, *with* 18 N.Y.2d 521.)

six years of litigation, and after incurring for Respondent expenses and taxable costs far in excess of the sum of money originally offered to Petitioner (Petition, p. 16), Petitioner now claims that the Court of Appeals abused its discretion by refusing to allow him to amend his complaint and start a new action. The denial of Petitioner's motion for leave to amend his complaint, embodied in that Court's denial of rehearing, certainly was no abuse of discretion, and should not be disturbed by this Court.

CONCLUSION

The decision below is clearly correct and is not deserving of review by this Court. The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

June 5, 1967.

Respectfully submitted,

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APPENDIX A

Opinion of McLean, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MCLEAN, *D.J.*

This is an action in *quantum meruit* to recover a finder's fee. The action was originally brought in the Supreme Court, New York County, and was removed to this court by defendant on the ground of diversity of citizenship. At the conclusion of the trial, the jury found for plaintiff in the sum of $140,000. Plaintiff thereupon moved to add pre-judgment interest to the verdict. Defendant opposes that motion.

Under New York law, a successful plaintiff in an action to recover the reasonable value of services is entitled to pre-judgment interest.

> New York CPLR §5001
> *Spanos* v. *Skouras Theatres Corp.*, 235 F. Supp. 1, 17 (S.D.N.Y. 1964)

Defendant contends, however, that this question is governed by the law of Ireland. Defendant asserts that under Irish law, pre-judgment interest may not be recovered. No competent proof of Irish law has been offered by either party. Whether it is necessary to take such proof depends upon the decision as to which law governs.

Appendix A

In this diversity case, this court applies the New York rule of conflict of laws.

> *Klaxon* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941);
> *St. Clair* v. *Eastern Air Lines, Inc.*, 302 F. 2d 477 (2d Cir. 1962).

In contract actions New York has adopted the "center of gravity" or "grouping of contacts" theory of conflicts.

> *Auten* v. *Auten*, 308 N.Y. 155 (1954).

Interest is a part of damages. No New York case has been found which, since *Auten* v. *Auten*, has squarely held that the grouping of contacts theory controls the selection of the law to be applied in determining whether this element of damage may be recovered in a contract action. At least one New York case, however, has apparently employed this theory, without expressly saying so, in order to select the law which governs the question of pre-judgment interest.

> *Gold Medal Farms Inc.* v. *Rutland County Co-op. Creamery, Inc.*, 9 App. Div. 2d 473, 195 N.Y.S. 2d 179 (3rd Dept. 1960).

Moreover, the Court of Appeals for this circuit has concluded that the New York courts would follow the *Auten* doctrine in this situation.

> *Royce Chemical Co.* v. *Sharples Corp.*, 285 F. 2d 183 (2d Cir. 1960).

Appendix A

This decision is binding upon me and I must therefore proceed on the assumption that it is the law of New York that the choice of the governing law on this point depends upon a proper alignment of the contacts.

In the present case, plaintiff at all times has been and is a resident of New York. Defendant is a Florida corporation with its principal place of business there. The conversations between plaintiff and defendant's representative, Ball, which the jury evidently found gave rise to at least an implied, and perhaps also to an express, agreement by defendant to retain plaintiff to act on its behalf and to compensate him for his services, took place in New York. Much of the relevant correspondence emanated from plaintiff in New York. On the other hand, the property which was the subject of the negotiations was in Ireland. It consisted of a paper mill owned by an Irish corporation, National Board and Paper Mills Ltd. ("National"), virtually all the stock of which was owned by two other Irish corporations, Industrial Credit Company Ltd. ("Industrial") and Irish Assurance Company Ltd. ("Irish Assurance"). Plaintiff and Ball eventually went to Ireland. In Ireland plaintiff introduced Ball to officials of National. Also, it was in Ireland that plaintiff and Ball met with an officer of Industrial. Thus, part of plaintiff's services were performed in Ireland. Plaintiff performed no services of any importance after these meetings in Ireland, but the jury found that the services which he performed up to that time were sufficient to entitle him to compensation. Conse-

quently, it is immaterial that the eventual contract between defendant and Industrial was negotiated by defendant in Florida and ultimately signed in Ireland.

These are the relevant contacts. No New York case decided since *Auten* has been discovered which affords any guide as to how these contacts should be grouped. My task is to divine what a New York court, presented with these facts, would do.

The New York statute and decisions express the policy of New York that in order to provide full compensation for a plaintiff who is entitled to recover the reasonable value of services, interest should be included for the period during which plaintiff was deprived, by defendant's breach, of the use of the money which defendant should have paid him. In my opinion, a New York court would hold that a New York resident, suing in New York, under an agreement made and partially performed in New York, should be compensated in accordance with New York's idea of full compensation. In the light of New York's policy, it would seem irrelevant that part of plaintiff's services were performed in another state or country. Plaintiff is entitled to be fully compensated, regardless of where he performed his services.

In *Auten,* the court emphasized that the merit of the grouping of contacts approach "is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately

concerned with the outcome of [the] particular litigation' . . ." (308 N.Y. at 161). It is difficult to believe that the Republic of Ireland would have any interest in the amount of the damages to be awarded to a New York citizen in a suit in a New York court against an American corporation arising out of a contract between them made in New York. It is hard to see how Ireland is in any way concerned with the outcome of this litigation in which no Irish citizen is involved. Certainly New York is more intimately concerned with it than Ireland. For these reasons I hold that New York law governs the claim for pre-judgment interest in this case.

The question remains as to the date from which interest should be computed. CPLR §5001 provides that:

> "Interest shall be computed from the earliest ascertainable date the cause of action existed. . . ."

What is that earliest ascertainable date in this case?

One necessary element of plaintiff's claim which he was required to establish in order to recover was that a contract was eventually made between defendant and Industrial for the purchase by defendant of National's stock. A contract was in fact made between these parties on May 8, 1958. In form, however, the contract was not a flat commitment by defendant to buy the stock. It was an option to purchase the stock for a sum in pounds equivalent to $1,755,373, an option which could be exercised at any time up to August 8,

1963, a date which was subsequently extended to August 8, 1966. The contract further provided that each year defendant should pay to Industrial £100,000, equivalent to $280,000, and that these payments should be applied first to pay off debts owed by National to Industrial or owed by National to others and guaranteed by Industrial.

These debts totalled $952,823. Payments by defendant in excess of that amount were to be applied to the purchase price of the stock. The contract provided that the sums paid by defendant pursuant to this provision up to $952,823 were to be treated as an unsecured non-interest bearing loan by defendant to National but the contract further provided that in the event that defendant failed to exercise its option to buy the stock, defendant should not be entitled to the repayment by National or Industrial of any part of the moneys theretofore paid by defendant to Industrial.

The contract also provided that defendant should have the right to manage the paper mill. In fact, defendant exercised that right immediately upon the signing of the contract on May 8, 1958 and ever since has managed the mill and has nominated a majority of National's board of directors.

Defendant has made the payments of $280,000 each year. At the time of trial, the total amount paid by defendant to Industrial was $2,240,000.

Defendant argued at the trial that this contract was insufficient to support a finding that a purchase

had actually been made. Plaintiff claimed the contrary, and urged that the jury might properly take into account on this issue not only the terms of the contract itself, but also the acts of the parties under it, down to the date of trial. I adopted plaintiff's contention and charged the jury that it might consider the evidence as to the amounts that defendant had paid pursuant to the contract. Defendant did not except to this part of the charge. The jury by its verdict resolved this issue in plaintiff's favor.

I have no doubt that the verdict was correct on this point. Certainly, by now, defendant has invested such a large sum in this enterprise that it is highly unlikely that it will hereafter decide to abandon the project and forfeit the $2,240,000 which it has already paid against a total obligation of approximately $2,700,000. On the other hand, at the moment of signing the contract on May 8, 1958, defendant was not obligated to pay anything, except the initial payment of $280,000, and theoretically, at least, it could have changed its mind the next day without suffering any loss over and above that down payment. The form of the contract cannot be completely ignored. Presumably there was a business reason for drawing it in that form. Defendant was not committed to buy the stock on May 8, 1958. Therefore, plaintiff's right to compensation cannot be said to have come into existence on that day.

As time went on, however, defendant did become committed, as a practical matter, in the sense that it eventually became too late for defendant to withdraw

from the transaction without suffering an undue penalty. Just when that point of no return was reached is hard to say with precision. Clearly, it was reached sometime between the signing of the contract in May 1958 and the trial in November 1965.

Under these circumstances, it appears that the fair thing to do is to fix the beginning of interest on the date when this action was commenced, *i.e.*, December 2, 1960. By that time defendant had paid to National a total of $840,000 and thus had given a substantial hostage to fortune. Also, by that time, defendant had been operating the mill for over 2½ years and was thoroughly familiar with and involved in the business. It may properly be found, viewing the matter realistically, that by that time defendant was definitely committed, and hence that by that time plaintiff's cause of action accrued.

My conclusion is that plaintiff is entitled to interest at the rate of six per cent on $140,000 from December 2, 1960. The Clerk is directed to compute that sum and to add it to the verdict.

So ordered.

Dated: January 4, 1966

/s/ Edward C. McLean
U.S.D.J.

APPENDIX B

Opinion of Palmieri, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PALMIERI, *J.*

This is an action in *quantum meruit* to recover $175,000 as the reasonable value of the plaintiff's services to defendant in finding and bringing to defendant's attention the corporate opportunity to acquire an Irish corporation. After considerable pre-trial activity, the case is very close to being assigned for trial.

The motion before the Court is brought by the defendant for summary judgment dismissing the action. The basis for the motion is that under the law of the State of New York, which concededly applies, the Statute of Frauds (General Obligations Law Section 5-701(10) formerly Personal Property Law Section 31(10))[1] renders void the transaction which is the basis for the suit.

1. The statute, amended in 1964 by the addition of the language hereinafter [italicized], provides:

Agreements required to be in writing.

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

. . . .

"10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, ex-

(*Continued on next page.*)

Appendix B

In 1961, Judge Metzner of this Court granted plaintiff's motion to strike the defendant's affirmative defense based upon the allegation that plaintiff's claims were barred by the New York Statute of Frauds. *Lee* v. *St. Joe Paper Co.*, 197 F. Supp. 229 (S.D.N.Y. 1961). Notwithstanding this decision, defendant suggests that the 1964 amendment to the New York Statute of Frauds set forth in footnote 1 is declaratory of the former law and that it operates retroactively so as to preclude plaintiff's action which was initiated several years before the amendment.

The relationship between the parties was not based exclusively on oral communications. The papers before the Court indicate that upon a trial the plaintiff may be able to establish that he was working for the defendant's account at its special instance and request; that he expected compensation; and that the defendant was aware of this expectation. A crucial and basic issue of fact is presented as to whether the transaction satisfies the statute's requirement of "some note or memorandum" which the New York cases hold need not be an integrated contract. *Seymour* v. *Warren*,

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change, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. *'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.* This provision *shall apply to a contract implied in fact or in law to pay reasonable compensation but* shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

179 N.Y. 1 (1904); *Crabtree* v. *Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E. 2d 551 (1953); *Transit Advertisers, Inc.* v. *New York, New Haven & Hartford R.R.*, 194 F.2d 907 (2d Cir. 1952). Only upon a full factual exploration at the trial can this issue be resolved. The further question much bruited by the defendant on this motion, as to whether the 1964 Amendment to the New York Statute of Frauds vitiates the transaction, can be appropriately decided only when the basic factual premises are established. The meaning and application of the statute and whether it is declaratory of prior law, retroactive in its application, or has only prospective application following the 1964 Amendment are all prematurely presented by this motion. If an example were needed to demonstrate the problems and difficulties of attempting to apply the New York Statute of Frauds one need only compare *Farmer* v. *Arabian American Oil Co.*, 176 F. Supp. 45 (S.D.N.Y. 1959), *reversed*, 277 F.2d 46 (2d Cir. 1960), with *Perrin* v. *Pearlstein*, 314 F.2d 862, 866 (2d Cir. 1963). Moreover, "summary judgment is particularly inappropriate where 'the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.' *Empire Electronics Co.* v. *United States*, 311 F.2d 175, 180 (2d Cir. 1962); see *Alabama Great So. R.R.* v. *Louisville & Nashville R.R.*, 224 F.2d 1, 5 (5th Cir. 1955); *Subin* v. *Goldsmith*, 224 F.2d 753, 758 (2d Cir. 1955). '"A judge may not, on a motion for summary judgment, draw fact inferences. . . . Such inferences may be

drawn only on a trial.'" *Bragen* v. *Hudson County News Co.*, 278 F.2d 615, 618 (3d Cir. 1960)." *Cross* v. *United States*, 336 F.2d 431, 433 (2d Cir. 1964).

The motion for summary judgment is denied.

IT IS SO ORDERED.

Dated: New York, N.Y.
June 15, 1965

/s/ EDMUND L. PALMIERI
U.S.D.J.

APPENDIX C

Opinion of Metzner, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

METZNER, District Judge.

This is an action in quantum meruit to recover the reasonable value of services alleged to have been furnished by plaintiff in arranging the defendant's acquisition of an interest in or control of a company known as National Board and Paper Mills, Ltd. Plaintiff has moved pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, 28 U.S.C.A. to strike defendant's affirmative defense alleging the statute of frauds, and the affirmative defense alleging that plaintiff has failed to claim that "there are any monies due or owing from defendant to plaintiff."

The parties agree that New York law applies to this cause of action and that normally, under that law, the statute of frauds is not a defense to an action in quantum meruit. Harmon v. Alfred Peats Co., 1926, 243 N.Y. 473, 154 N.E. 314. Defendant, however, would have us make an exception to this rule in those actions brought by a business broker seeking to recover the value of his services. It contends that subdivision 10 of Section 31 of the New York Personal Property Law, McKinney's Consol. Laws, c. 41, prohibits re-

covery for such services unless the statute of fraud provisions are satisfied. The New York courts have rejected this contention and applied the general rule to such transactions. Gibson v. Archer Productions, 1st Dept. 1952, 281 App.Div. 661, 117 N.Y.S.2d 438; Wells v. Dent, 4th Dept. 1957, 4 A.D.2d 307, 164 N.Y.S. 2d 646; Spring v. Moncrieff, 1955, 208 Misc. 671, 144 N.Y.S.2d 664; Black v. Fisher, Sup. 1955, 145 N.Y.S. 2d 142; Brand v. Gromet, 1956, 3 Misc.2d 991, 148 N.Y.S.2d 613; Kuffler v. List, D.C.S.D.N.Y.1956, 144 F.Supp. 776. Defendant's first affirmative defense is therefore insufficient and must be stricken.

Defendant's second affirmative defense, insofar as it rests on plaintiff's failure to plead "monies due or owing from defendant", must also be stricken. The complaint, after detailing the claim in 12 paragraphs, states that the "work, labor and services were of the reasonable value of $175,000." and in the "Wherefore" clause demands judgment against the defendant for that amount. This satisfies the notice pleading contemplated by Rule 8 of the Federal Rules of Civil Procedure. Dioguardi v. Durning, 2 Cir., 1944, 139 F.2d 774, 775.

So ordered.

APPENDIX D

Opinion of Bryan, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

BRYAN, District Judge:

This is an action in quantum meruit to recover the reasonable value of services alleged to have been performed by plaintiff for the defendant in arranging for the acquisition by the defendant of an interest in a paper mill in Waterford, Ireland. Defendant now moves to transfer the action to the United States District Court for the District of Florida pursuant to 28 U.S.C. §1404(a).

Plaintiff is a citizen and resident of New York and commenced the action in the Supreme Court, New York County. Defendant, a Florida corporation, with its principal place of business in Florida, removed the action to this court on the grounds of diversity of citizenship, pursuant to 28 U.S.C. §1441.

Defendant urges that the action should be transferred to Florida for the convenience of parties and witnesses and in the interests of justice. In my view it has failed to establish that it is entitled to such a transfer.

Plaintiff is plainly a bona fide resident of New York and does business here. Defendant is now quali-

fied to do business in this state and has a plant in Rochester, New York, a sales office in New York City, and has maintained for some time a suite of offices for the use of its officers in the St. Regis Hotel in New York. Defendant does business in other states as well.

Plaintiff claims that most of the transactions which form the basis for the action took place in New York and in Ireland. He says that he conferred with officers of the defendant in New York and reached the understanding, upon which the services were performed, here. Defendant, on the other hand, through its president, Ball, claims that the conversations which form the basis of plaintiff's claim took place in Florida and not in New York, and that the claim is governed by Florida law.

Thus, there is direct conflict between the parties on this score. Such a dispute cannot be resolved without going into the merits of the case and a hearing on the merits at this stage of the action would be inappropriate. It appears that at least some relevant conversations took place in New York and others in Florida. It certainly cannot be said on the papers before me that these were entirely Florida transactions and that the case has no connection with this jurisdiction.

Defendant says that its witnesses all reside in Florida and that any records concerning the subject matter of the action are kept in its principal office there. However, with one exception, the witnesses defendant refers to are its own officers or employees. These witnesses are under defendant's control and there should

be no difficulty in producing them at a trial in New York.

Defendant further claims that its president, Ball, who was principally concerned in the transactions with plaintiff, has a heart condition which might interfere with his travel to New York. While Ball seems to have cut down his business activities to some extent because of his condition it has not been established to my satisfaction that he is unable to travel or, indeed, that it will imperil his health to come to New York for trial, if that in itself were a reason for transfer. Ball is still active in business and, since 1957 when he had a heart attack, has traveled widely. Even if he were prevented from coming to New York his deposition could be readily taken.

The only witness for the defendant who is not an officer or employee is a man named Bennett, who defendant claims was present at some conversations in Florida between Ball and the plaintiff. Defendant has not made any clear showing of the significance of this witness's testimony. Nor has it shown that there would be any great difficulty in getting him to fly to New York for a trial.

The defendant's records concerning a case of this nature can scarcely be voluminous and the defendant should have no difficulty in producing them at a trial here. Moreover, it has an office and accommodations for its officers in New York City and is accustomed to do business in New York State.

Plaintiff, on the other hand, as a bona fide resident of New York, plainly had a right to bring the action in this state and acquired jurisdiction over defendant here. He carries on his business here and claims that a substantial part of the transactions occurred here. He was entitled to choose this forum and no imputation of forum shopping can be made against him. It appears that as a small business man, without staff, serious hardship would be imposed upon him were he required to conduct and try this action in Florida.

Defendant has failed to show such balance of convenience in its favor as would override plaintiff's right to choose his own forum and to have the action tried in the district where he resides, where he conducts his business, and where defendant also does business.

Defendant's motion to transfer is in all respects denied.

It is so ordered.

Dated: New York, N. Y.
May 5, 1961

/s/ Frederick V.P. Bryan
U.S.D.J.